

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

BARBARA THOMAS, individually and on behalf all others similarly situated,)	
)	
Plaintiff,)	CASE NO. 19-cv- 00152
)	
v.)	CLASS ACTION
)	
FINANCIAL CORPORATION OF AMERICA,)	JURY TRIAL DEMANDED
)	
Defendant.)	
)	

CLASS ACTION COMPLAINT

Plaintiff, BARBARA THOMAS, individually and on behalf of all others similarly situated, alleges on personal knowledge, investigation of her counsel, and on information and belief as follows:

NATURE OF ACTION

1. This case involves activities conducted by Defendant Financial Corporation of America (“FCA”) in contacting individuals believed to be its debtors through use of prerecorded messages and automated calls in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 *et seq.*, and the Federal Communications Commission (“FCC” or “Commission”) rules promulgated thereunder, 47 C.F.R. § 64.1200 (hereinafter referred to as the “TCPA”).

2. Defendant has violated the TCPA by making calls to Plaintiff and Class Members using an “automatic telephone dialing system” and an “artificial or prerecorded voice” as described in 47 U.S.C. § 227 (b)(1), without Plaintiff’s and Class Members’ prior express consent within the meaning of the TCPA.

3. Plaintiff brings this action for injunctive relief and statutory damages, all arising from the illegal activities of Defendant, which used pre-recorded and automatically dialed messages to solicit payment from individuals it presumably believed to be debtors.

JURISDICTION AND VENUE

4. This matter in controversy exceeds \$5,000,000, as each member of the proposed Class of thousands is entitled to up to \$1,500.00 in statutory damages for each call that has violated the TCPA. Accordingly, this Court has jurisdiction pursuant to § 1332(d)(2). Further, Plaintiff alleges a national class, which will result in at least one Class member belonging to a different state. Therefore, both elements of diversity jurisdiction under the Class Action Fairness Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.

5. This Court also has federal question jurisdiction pursuant to 28 U.S.C. § 1331.

6. This Court has personal jurisdiction over Defendant because the conduct at issue in this case occurred, among other locations, in Texas.

7. Venue is proper because a substantial portion of the events complained of occurred in this District.

PARTIES

8. Plaintiff Barbara Thomas is, and at all times mentioned herein was, an individual citizen of the State of Texas residing in the City of Dallas.

9. Defendant Financial Corporation of America (“FCA”) is a Texas corporation with its principal place of business in Austin, Texas. FCA is a debt collection agency that uses the telephone in a business the principal purpose of which is the collection of debts, or that regularly collects or attempts to collect debts alleged to be due another.

**THE TELEPHONE CONSUMER PROTECTION
ACT OF 1991 (TCPA), 47 U.S.C. § 227**

10. In 1991, Congress enacted the TCPA¹ in response to a growing number of consumer complaints regarding certain telemarketing practices.

11. The TCPA regulates, among other things, the use of automated telephone equipment, or “autodialers.” Specifically, the plain language of section 227(b)(1)(A)(iii) prohibits the use of autodialers to make any call to a wireless number in the absence of an emergency or the prior express consent of the called party. The TCPA defines an “automatic telephone dialing system” as “equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers.”²

12. This statutory language dictates that “the term ‘automatic telephone dialing system’ means equipment which has the capacity—(1) to store numbers to be called *or* (2) to produce numbers to be called, using a random or sequential number generator—and to dial such numbers automatically (even if the system must be turned on or triggered by a person).” *Marks v. Crunch San Diego, LLC*, No. 14-56834, 2018 WL 4495553, at *8 (9th Cir. Sept. 20, 2018) (emphasis supplied).³

13. According to findings by the FCC, the agency Congress vested with authority to issue regulations implementing the TCPA, such calls are prohibited because, as Congress found,

¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227 (TCPA). The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*

² 47 U.S.C. § 227(b)(1)(A)(iii).

³ In the past, the FCC has held that this definition is satisfied when a dialing system has the capacity to call “a given set of numbers” or when “dialing equipment is paired with . . . a database of numbers.” *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14,014, ¶ 133 (2003); *see also In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 23 F.C.C. Rcd. 559, 566 (F.C.C. 2008) (rejecting argument that a dialing system “meets the definition of autodialer only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists” and reasoning that “the teleservices industry had progressed to the point where dialing lists of numbers was far more cost effective”).

automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used.⁴

14. The 2003 FCC order defined a predictive dialer as “an automated dialing system that uses a complex set of algorithms to automatically dial consumers’ telephone numbers in a manner that ‘predicts’ the time when a consumer will answer the phone and a telemarketer will be available to take the call.”⁵ The FCC concluded that “[t]he basic function of such equipment . . . [is] the capacity to dial numbers without human intervention.”⁶ A 2008 Declaratory Ruling “affirm[ed] that a predictive dialer constitutes an automatic telephone dialing system and is subject to the TCPA’s restrictions on the use of autodialers.”⁷ And in yet another order issued in 2012, the FCC again reiterated that the TCPA’s definition of an ATDS “covers any equipment that has the specified capacity to generate numbers and dial them without human intervention regardless of whether the numbers called are randomly or sequentially generated or come from calling lists.”⁸ In 2018, a decision struck down portions of a 2015 FCC Order, but “the prior FCC Orders are still binding.”⁹

15. Courts have also held that, based on the TCPA’s statutory language, a predictive dialing system constitutes an ATDS under the TCPA. *See, e.g., Marks*, 2018 WL 4495553

⁴ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

⁵ *Id.* at 14,143 n. 31.

⁶ *Id.* at 14,092.

⁷ In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (“2008 FCC Declaratory Ruling”), 23 F.C.C.R. 559, 23 FCC Rcd. 559, 43 Communications Reg. (P&F) 877, 2008 WL 65485 (F.C.C.) (2008).

⁸ In the Matter of Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991, 27 FCC Rcd. 15391, 15399 (2012).

⁹ *Reyes v. BCA Fin. Servs., Inc.*, Case No. 16-24077-CIV, 2018 WL 2220417, at *11 (S.D. Fla. May 14, 2018).

(“Although Congress focused on regulating the use of equipment that dialed blocks of sequential or randomly generated numbers—a common technology at that time—*language in the statute indicates that equipment that made automatic calls from lists of recipients was also covered by the TCPA.*”) (emphasis supplied); *accord Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638-39 (7th Cir. 2012).

16. Further, courts have long held that that a “called party” under the TCPA is the recipient of the call, not the party the caller was intending to reach.¹⁰

17. On January 4, 2008, the FCC released a Declaratory Ruling wherein it confirmed that autodialed and prerecorded message calls to a wireless number by a creditor (or on behalf of a creditor) are permitted only if the calls are made with the “prior express consent” of the called party.¹¹ The FCC “emphasize[d] that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.”¹²

18. In a portion unaffected by the D.C. Circuit, the 2015 FCC Order held that consumers may revoke consent through reasonable methods. Thus, consumers may revoke consent through any reasonable method, including orally: “[c]onsumers generally may revoke, for example, by way of a consumer-initiated call, directly in response to a call initiated or made by a caller, or at an in-store bill payment location, among other possibilities.”¹³

19. A single call using both a prerecorded voice and an autodialer constitutes two violations of the TCPA, even if both violations arose from the same call. *See Lary v. Trinity Physician Fin. & Ins. Servs.*, 780 F.3d 1101 (11th Cir. 2015).

¹⁰ See, e.g., *Osorio v. State FAssetCare Bank, F.S.B.*, 746 F.3d 1242, 1251 (11th Cir. 2014); *Soppet v. Enhanced Recovery Co., LLC*, 679 F.3d 637, 638-39 (7th Cir. 2012).

¹¹ 2008 FCC Declaratory Ruling, 23 F.C.C.R. at 564-65 (¶ 10).

¹² *Id.*

¹³ 2015 Order at (¶ 64).

FACTUAL ALLEGATIONS

20. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153(39).

21. Beginning in or around November of 2018, Plaintiff began receiving numerous autodialed and pre-recorded calls on her cellular phone ((XXX) XXX-2540) from FCA. When Plaintiff did not pick up the phone, FCA left a prerecorded voicemail informing Plaintiff that she should call back at 800-950-5762. There was at least one number that appeared in Plaintiff’s caller ID for these calls: 800-950-5762. This number appears to be associated with FCA. For example, when this number is called, a representative will answer the call and acknowledge he/she is employed with FCA. In addition, an Internet search of the aforementioned number is associated with FCA.¹⁴

22. FCA is, and at all times mentioned herein was a “person”, as defined by 47 U.S.C. § 153(39).

23. In receiving unwanted and unsolicited calls on her cellular telephone, Plaintiff suffered concrete harm in the form of lost time spent fielding the unwanted calls and attempting to get FCA to stop the calls, loss of use of her cellular telephone as the calls came in, and the invasion of privacy and intrusion upon her seclusion.

24. All telephone contact made by FCA to Plaintiff on her cellular telephone occurred via an “automatic telephone dialing system,” as defined by 47 U.S.C. § 227(a)(1), and used “an artificial or prerecorded voice” as described in 47 U.S.C. § 227(b)(1)(A).

25. The telephone number on which FCA used to contact Plaintiff was assigned to a cellular telephone service as specified in 47 U.S.C. § 227(b)(1)(A)(iii).

¹⁴ See <https://800notes.com/Phone.aspx/1-800-950-5762>.

26. Plaintiff did not provide her “prior express consent” allowing FCA to place telephone calls to Plaintiff’s cellular phone utilizing an “artificial or prerecorded voice” and “automatic dialing system” within the meaning of 47 U.S.C. § 227(b)(1)(A). Indeed, Plaintiff was never a customer and/or debtor of FCA or FCA’s clients, nor had she ever had any dealings with FCA whatsoever before FCA began calling her. In fact, FCA’s representatives asked for someone other than Plaintiff – a person whom Plaintiff did not know and with whom Plaintiff had no connection whatsoever. On information and belief, the calls were intended for someone other than Plaintiff.

27. Telephone calls made to Plaintiff’s cellular phone by FCA were not “for emergency purposes” as described in 47 U.S.C. § 227(b)(1)(A).

28. The telephone calls to Plaintiff’s cellular phone made by FCA, which utilized an “artificial or prerecorded voice” and an “automatic telephone dialing system” for non-emergency purposes and in the absence of Plaintiff’s prior express consent, violated 47 U.S.C. § 227(b)(1)(A).

29. Under the TCPA and pursuant to the FCC’s January 2008 Declaratory Ruling, the burden is on FCA to demonstrate that Plaintiff provided it with prior express consent within the meaning of the statute.¹⁵

CLASS ACTION ALLEGATIONS

30. Plaintiff brings this action on behalf of herself and on behalf of all other persons similarly situated (hereinafter referred to as “the Class”).

31. Plaintiff proposes the following Class definition, subject to amendment as appropriate:

All persons and entities throughout the United States (1) to whom FCA placed, or caused to be placed, a call directed to a number assigned to a cellular telephone

¹⁵ See *FCC Declaratory Ruling*, 23 F.C.C.R. at 565 (¶ 10).

service, but not assigned to the intended recipient of FCA's calls—in that the intended recipient of the calls was not the customary user of, or subscriber to, the telephone number, by (3) using an automatic telephone dialing system or an artificial or prerecorded voice, (4) from November 1, 2014 through and including the date of class certification.

Collectively, all these persons will be referred to as “Class members.” Plaintiff represents, and is a member of, the Class. Excluded from the Class are Defendant and any entities in which Defendant has a controlling interest, Defendant's agents and employees, any Judge to whom this action is assigned and any member of such Judge's staff and immediate family, and claims for personal injury, wrongful death and/or emotional distress.

32. Plaintiff does not know the exact number of members in the Class, but on information and belief, the number of Class members at minimum is in the thousands.

33. Plaintiff and all members of the Class have been harmed by the acts of Defendant, including, but not limited to, the invasion of their privacy, annoyance, waste of time, depletion of their cellular phone battery, and the intrusion on their cellular telephone that occupied it from receiving legitimate communications.

34. This Class Action Complaint seeks injunctive relief and money damages.

35. The joinder of all Class members is impracticable due to the size and relatively modest value of each individual claim. The disposition of claims in a class action will provide substantial benefit to the parties and the judicial economy of the Court in avoiding a multiplicity of identical suits. The Class can be identified easily through records maintained by Defendant.

36. There are well defined, nearly identical, questions of law and fact affecting all Class members. The questions of law and fact involving the Class claims predominate over questions which may affect individual Class members. Those common questions of law and fact include, but are not limited to, the following:

- a. Whether non-emergency calls made to Plaintiff and Class members' cellular telephones used an automatic telephone dialing system and/or an artificial or prerecorded voice;
- b. Whether such calls were made by Defendant;
- c. Whether Defendant can meet its burden of showing it obtained prior express consent (i.e., consent that is clearly and unmistakably stated) to make such calls;
- d. Whether Defendant's conduct was knowing and/or willful;
- e. Whether Defendant is liable for damages, and the amount of such damages; and
- f. Whether Defendant should be enjoined from engaging in such conduct in the future.

51. As a person who received numerous and repeated telephone calls using an automatic telephone dialing system and an artificial or prerecorded voice, without her prior express consent within the meaning of the TCPA and Rules, Plaintiff asserts claims that are typical of each Class member. Plaintiff will fairly and adequately represent and protect the interests of the Class, and has no interests which are antagonistic to any member of the Class.

52. Plaintiff has retained counsel experienced in handling class action claims involving violations of federal and state consumer protection statutes, including claims under the TCPA.

53. A class action is the superior method for the fair and efficient adjudication of this controversy. Class wide relief is essential to compel Defendant to comply with the TCPA. The interest of Class and Subclass members in individually controlling the prosecution of separate claims against Defendant is small because the statutory damages in an individual action for the violation of the TCPA are small. Management of these claims is likely to present significantly fewer difficulties than are presented in many class claims because the calls at issue are all automated and prerecorded and the Class members did not provide prior express consent, as required under the statute, to authorize such calls to their cellular telephones.

54. Defendant has acted on grounds applicable to the Class, thereby making final injunctive relief and corresponding declaratory relief with respect to the Class as a whole appropriate. Moreover, on information and belief, Plaintiff alleges that the TCPA violations complained of herein are substantially likely to continue in the future if an injunction is not entered.

CAUSES OF ACTION

FIRST COUNT KNOWING AND/OR WILLFUL VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227, *ET SEQ.*

55. Plaintiff incorporates by reference the foregoing paragraphs of this Complaint as if fully stated herein.

56. The foregoing acts and omissions of FCA constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each of the above cited provisions of 47 U.S.C. § 227, *et seq.*

57. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and each member of the Class are entitled to treble damages of up to \$1,500.00 for each and every violation of the statute, pursuant to 47 U.S.C. § 227(b)(3).

58. Plaintiff and all Class members are also entitled to and do seek injunctive relief prohibiting such conduct violating the TCPA by Defendant in the future. Plaintiff and Class members are also entitled to an award of attorneys' fees and costs.

SECOND COUNT STATUTORY VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT, 47 U.S.C. § 227 *ET SEQ.*

59. Plaintiff incorporates by reference the foregoing paragraphs of this Complaint as if fully set forth herein.

60. The foregoing acts and omissions of Defendant constitute numerous and multiple violations of the TCPA, including but not limited to each of the above-cited provisions of 47 U.S.C. § 227 *et seq.*

61. As a result of Defendant's violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and Class members are entitled to an award of \$500.00 in statutory damages for each and every violation of the statute, pursuant to 47 U.S.C. § 227(b)(3)(B).

62. Plaintiff and Class members are also entitled to and do seek injunctive relief prohibiting Defendant's violation of the TCPA in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court grant Plaintiff and all Class members the following relief against Defendant:

A. Injunctive relief prohibiting such violations of the TCPA by Defendant in the future;

B. As a result of Defendant's willful and/or knowing violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each Class member treble damages, as provided by statute, of up to \$1,500.00 for each and every violation of the TCPA;

C. As a result of Defendant's violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each Class member \$500.00 in statutory damages for each and every violation of the TCPA;

D. An award of attorneys' fees and costs to counsel for Plaintiff and the Class;

E. An order certifying this action to be a proper class action pursuant to Federal Rule of Civil Procedure 23, establishing an appropriate Class and any Subclass(es) the Court deems appropriate, finding that Plaintiff is a proper representative of the Class and any Subclass(es), and

appointing the lawyers and law firms representing Plaintiffs as counsel for the Class and any Subclass(es);

F. Such other relief as the Court deems just and proper.

Dated: January 18, 2019

Respectfully submitted,

BARBARA THOMAS

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